83-604

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN IVEY SANDLIN,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
NORTH CAROLINA

ROBERT E. WHITLEY
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Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether sentencing a defendant in excess of the statutory presumptive sentence violates the eighth amendment in the absence of any aggravating factors?

II. Whether principles of due process were complied with when the petitioner was convicted upon circumstantial evidence that indicated his guilt was not established beyond a reasonable doubt?

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. John Ivey Sandlin—Petitioner
2. The State of North Carolina—Respondent

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STATE OF NORTH CAROLINA,
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PETITION FOR WRIT OF CERTIORARI
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John Ivey Sandlin, prays that a writ of certiorari issue to review the July 7, 1983 judgment of the Supreme Court of North Carolina.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported in State of North Carolina v. John Ivey Sandlin, No. 243P83 (July 7, 1983). A copy of said opinion and order is attached hereto as Appendix A. The opinion of the North Carolina Court of Appeals is labelled Appendix B.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on July 7, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal rests on the eighth and fourteenth amendments.

Amendment 8:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 14:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

The Congress shall have power to enforce, by appropriate legislation the provisions of this article.

STATEMENT OF THE CASE

This is a criminal prosecution of John Ivey Sandlin. Mr. Sandlin was indicted for the first degree murder of Linda Nguyen Sandlin. He pleaded not guilty and was tried for and convicted of second degree murder. The pertinent facts of the case elicited at trial were summarized by the North Carolina Court of Appeals as follows:

> On or about 28 May 1981, Linda Sandlin visited an attorney to find out if her husband, the defendant, had been properly divorced from his earlier marriage to Mildred Sandlin. Mildred Sandlin and the defendant were married in 1947. They separated in 1967, but they had never obtained a divorce. As a result of Linda Sandlin's visit, her attorney wrote Mildred Sandlin asking if the defendant had ever

obtained a divorce from her, but Mildred Sandlin never responded to the letter. On 10 July 1981 the defendant called Mildred Sandlin concerning a possible visit to see her. During that conversation Mildred Sandlin brought up the subject of the attorney's letter. Defendant replied, "That's something Linda's started." Later in the day, Mildred Sandlin called the defendant's sister and told her that because of her military dependent status she had been receiving "medication" and she did not want to lose that. The defendant testified he and Linda had discussed often the idea of getting a divorce from Mildred Sandlin and "what might happen in the case I passed away." Also, the decedent had expressed to the defendant's niece, Joann Stroud, her fear of losing her savings "in a home that would not be hers if something happened to John [Sandlin] because

she had reason to believe that he had a legal wife living."

The State's witness, Jeff L. Moody, Sr., who lived next door to the defendant and the decedent, testified that he last saw Linda Sandlin on 21 July 1981 between 9:30 a.m. and 11:00 a.m. hanging a dress on her clothes line. Another witness, Lawton Earl Howard, testified he passed the defendant's home several times on 21 July 1981 while transporting tobacco to his barn. He testified that he was driving by at approximately 9:00 a.m. or 9:30 a.m. and saw the defendant with a small woman he described was of a nationality other than American. On this occasion the defendant's car was parked in the carport with the front end facing in. When Mr. Howard passed by again at approximately 11:30 a.m. he noticed the defendant's car was backed into the carport. The trunk was about even with the door-

steps and the trunk lid was open. Two days later, on 23 July 1981, the defendant reported the victim as missing and stated he had last seen her at 1:45 or 2:00 p.m. on 21 July 1981.

On 14 September 1981 the victim's body was found in a grave located near a group of pine trees behind Oak Ridge Memorial Cemetery in Pink Hill, North Carolina. The owner and operator of the cemetery, James Clifton Tyndall, testified that sometime during July the defendant had asked him if there was a road that went back to the cemetery to a row of pine trees. That conversation, along with the defendant's inquiries into the purchase of burial plots at the cemetery and the county sheriff's comments to Mr. Tyndall that foul play was suspected in connection with the victim's disappearance, prompted Mr. Tyndall's search of the area which resulted in locating the body.

In the medical examiner's opinion, the victim was dead when placed in the ground and had been buried for approximately two months. The cause of death was determined to be mechanical strangulation. A cloth ligature or binding was wrapped tightly around the decedent's neck. Expert testimony revealed the cloth ligature was a dull blue or dull heavy blue velour fabric.

Defendant's neighbor, Jeff Moody, Sr., testified that during visits to defendant's home he had seen the defendant wearing a dark blue bathrobe made of "the type of material that a regular downy towel is made of." The bathrobe had a belt of the same color and material that was about three feet long and an inch and a half wide.

. . . .

Prior to Linda Sandlin's murder, her mother had seen the defendant hold a knife to Linda's neck and threaten to cut her throat in

> February 1979. On other occasions the mother had seen the defendant hit her daughter and kick her in the back. The defendant himself admitted he had slapped Linda before, and she had threatened to leave him "a hundred times." A long-time friend of the defendant, Anthony W. Shaw, testified that during a conversation with the defendant in Las Vegas the defendant stated "The best way that you could do away with a person would be to get a piece of wire and put [it] around their neck and strangle them. . . ."

300 S.E.2d at 894-96.

REASONS FOR GRANTING CERTIORARI

The state courts below rendered decisions contrary to the mandates of the eighth and fourteenth amendments to the Constitution of the United States by sanctioning sentencing in excess of the statutory presumptive sentence in the absence of any aggravating factors.

Moreover, the courts respectively upheld a conviction based upon circumstantial evidence which did not rise to establishing guilt beyond a reasonable doubt, as required by the due process clause and the fourteenth amendment to the Constitution of the United States.

These are important questions involving interpretation of federal constitutional law.

Question 1

Pursuant to N.C. Gen. Stat. § 15A-1340.4(f)(1) (Cum. Supp. 1981) the presumptive sentence for second degree murder in North Carolina is fifteen years. If, however, the trial judge finds an aggravating factor or mitigating factor, he or she may impose a greater or lesser sentence. N.C.G.S. § 15A-1340.4(a) (Cum. Supp.

1981). In the instant case, the trial judge found the defendant's lack of a criminal record to be a mitigating factor under N.C.G.S. § 15A-1340.4(2)(a). The court, however, found as an aggravating factor the "especially heinous, atrocious or cruel" nature of the crime. N.C.G.S. § 15A-1340.4(a)(1)(f). State v. Sandlin, 61 N.C. App. 421, 300 S.E.2d 893, 898 (1983). Presumably, the court reached this conclusion because the death was caused by strangulation. Regardless, it was upon this basis that the appellate courts upheld the sentence. The court then found that the aggravating factor outweighed the mitigating factor, as provided for in N.C.G.S. § 15A-1340.4(b) (Cum. Supp. 1981), and sentenced Mr. Sandlin to a term of thirty-five years.

It is settled that a trial court has generally broad discretion in passing sentence. Nevertheless, sentences based upon erroneous material or assumptions violate due process. United States v. Tucker, 404 U.S. 443 (1971); Townsend v. Burke, 334 U.S. 736 (1940). As observed in Dorszynski v. United States, 418 U.S. 424 (1974), even though an appellate court has no control over a sentence which is within the limits allowed by statute:

> Appellate modification of a statutorily-authorized sentence . . . is an entirely different matter than the careful scrutiny of the judicial process by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is,

> on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases.

418 U.S. at 443 (emphasis in original).

The principle that due process mandates that a defendant not be sentenced on the basis of invalid premises has been recognized by the federal circuit courts as well. United States v. Tobias, 662 F.2d 381, 388 (5th Cir. 1981); United States v. Harris, 558 F.2d 366 (7th Cir. 1977); United States v. Espinoza, 481 F.2d 553, 555 (5th Cir. 1973); McGee v. United States, 462 F.2d 243, 245 n.2 (2d Cir. 1972). It is submitted that the instant sentence was invalid pursuant to the eighth amendment and the due process clause of the fourteenth amendment. The trial judge failed to find any aggravating factor to justify the thirty-five

year sentence beyond the simple declaration that the crime was especially heinous, atrocious, or cruel. The appellate courts intimated that death by strangulation necessarily fits this definition. Analysis of pertinent authority, however, reveals that such an assumption may not be made.

First, it has been held that when determining the meaning of "especially heinous, atrocious, or cruel," it must be remembered that:

> By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection.

State v. Goodman, 298 N.C. 1, 257 S.E.2d

569 (1979). In Goodman, the court rendered the following definition and the foregoing phrase:

> "[E]specially heinous, atrocious or cruel" means extremely or especially or particularly heinous or atrocious or cruel. You're instructed that "heinous" means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.

Id.

Although Goodman involved imposition of the death penalty, it is clear that the same analysis applies to N.C. Gen. Stat. § 15A-1340.4. In

State v. Green, ___ N.C. ___ , 301 S.E.2d 920 (1983), the court specifically held that standing alone, the use of a deadly weapon to shoot a victim could not be considered as a factor in aggravation under N.C.G.S. § 15A-1340.4(a)(1). The principle that the mere fact of a killing does not render the offense especially heinous or cruel has been recognized in other jurisdictions as well. See Lewis v. State, 398 So. 2d 432 (Fla. 1981) (shooting alone insufficient); Demps v. State, 395 So. 2d 501 (Fla.), cert. denied, 454 U.S. 932 (1981) (stabbing alone insufficient).

Generally, the cruel or heinous nature of the crime is shown where the victim was beaten severely, see Gardner v. State, 313 So. 2d 675 (Fla. 1975), mutilated, see Halliwell v. State, 323

So. 2d 557 (Fla. 1975), or buried alive, see State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1981). None of the foregoing factors were present in the instant case. Rather, it appears that Mr. Sandlin's sentence was upheld purely on the basis that strangulation was the cause of death. Although arguably murder is by definition harsh and evil, it is clear that the statute mandates that the killing be shockingly evil, savagely fierce or designed to inflict a high degree of pain. By disregarding these elements when upholding Mr. Sandlin's sentence, the court effectively denied him his eighth and fourteenth amendment rights as guaranteed by the United States Constitution.

Question 2

Proof of a criminal charge beyond a reasonable doubt is constitutionally required pursuant to traditional notions of due process. Engle v. Isaac, 456 U.S. 107 (1982); Jackson v. Virginia, 443 U.S. 307, 315 (1979); In re Winship, 397 U.S. 358, 362 (1970); Brinegar v. United States, 338 U.S. 160, 174 (1949). In Winship this court observed:

> [A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in Speiser v. Randall, supra, 357 U.S. at 525-526, 78 S.Ct., at 1342: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. When one party

> has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967).

397 U.S. at 363-64.

In the instant case, the conviction rested upon circumstantial evidence that,

under applicable law, failed to meet the mandated reasonable doubt standard. Pursuant to North Carolina case law, the evidence was insufficient to establish Mr. Sandlin's guilt beyond a reasonable doubt. State v. Lee, 294 N.C. 299, 240 S.E.2d 449 (1978); State v. Cutler, 271 N.C. 379, 156 S.E.2d 679 (1967). In Lee, the defendant was charged with the first degree murder of the woman he was living with and was found guilty of second degree murder. The police arrived at the defendant's father's house and discovered the defendant standing in the yard acting nervously. The defendant informed the police that he had been shot by an unknown man, but it was later determined that he had been wounded by his father during an argument and subsequent scuffle involving a pistol.

The victim's body was discovered later that evening in the woods several miles from the defendant's home. It was determined that the victim's death resulted from two gunshot wounds. When confronted by police regarding the victim's death, the defendant "sort of smiled and said, well, you read my rights and everything, didn't you." 240 S.E.2d at 450.

The evidence also revealed that the defendant had beaten the deceased in the past and also told a neighbor that he intended to kill the deceased. Two gunshots were heard by the defendant's neighbor on the evening before the victim's body was found. The North Carolina Supreme Court, however, upheld the reversal of the conviction despite the existence of the foregoing evidence

because it did not rise to the "beyond a reasonable doubt" standard:

> The State's evidence in this case establishes a murder; and considered in the light most favorable to the State, shows that the defendant had the opportunity, means and perhaps the mental state to have committed this murder. Such facts, taken in the strongest view adverse to defendant, " . . . excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party. . . ."

240 S.E.2d at 451 (quoting State v. Goodson, 107 N.C. 798, 12 S.E. 329 (1890)).

Similarly, in State v. Cutler, supra, the evidence against the defendant revealed that the victim had been stabbed in the heart. The defendant's car was

found parked nearby the scene of the homicide with blood stains in it. The defendant had been observed, after the crime had been committed, in the vicinity of the crime with blood on his clothes. Moreover, a hair was discovered on the defendant's pocket knife which resembled hair from the victim's chest. Nevertheless, the court rejected the notion that the foregoing evidence was sufficient beyond a reasonable doubt to establish the defendant's guilt. The court stated its standard as follows:

> If, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed.

156 S.E.2d at 682.

Clearly, pursuant to the above established standards for proof beyond a reasonable doubt, the instant evidence fell far below that required standard. See also State v. Poole, 285 N.C. 108, 203 S.E.2d 786 (1974) (where evidence most favorable to state is sufficient only to raise a suspicion or conjecture it is insufficient to satisfy reasonable doubt standard). See generally State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967); State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950); State v. McMillan, 43 N.C. App. 520, 259 S.E.2d 404 (1979); State v. Ledford, 23 N.C. App. 314, 208 S.E.2d 870 (1974). The federal circuits have also recognized that suspicion and conjecture do not rise to the level of certainty required to erase reasonable

doubt. See United States v. DuBois, 645 F.2d 642 (8th Cir. 1981); United States v. Knife, 592 F.2d 472 (8th Cir. 1979); United States v. Owen, 536 F.2d 340 (10th Cir. 1976); United States v. Diggs, 527 F.2d 509 (8th Cir. 1975); United States v. Carter, 522 F.2d 666 (D.C. Cir. 1975).

CONCLUSION

The clear import of the decisions above is that circumstantial evidence, which does not pass the reasonable doubt standard, may not be used to convict. Moreover, a sentence may not be upheld in excess of the presumptive sentence in the absence of any aggravating factors justifying such an excessive sentence. This result is contrary to the mandates of the eighth amendment and the due process clause of the fourteenth amendment

to the United States Constitution.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari filed on behalf of Petitioner John Ivey Sandlin were duly served upon Respondent State of North Carolina by placing same in the United States Mail first class postage pre-paid, certified return receipt requested, addressed to:

Rufus L. Edmisten
Attorney General
State of North Carolina

and

George W. Boylan
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APPENDIX A

STATE OF NORTH CAROLINA

v.

JOHN IVEY SANDLIN

No. 243P83.

Supreme Court of North Carolina.

July 7, 1983

Robert E. Whitley, Kinston, for defendant.

George W. Boylan, Asst. Atty. Gen., Raleigh, for the State

Defendant's petition for discretionary review, 61 N.C.App. 421, 300 S.E.2d 893, under G.S. § 7A-31. Denied.

APPENDIX B

STATE OF NORTH CAROLINA

v.

JOHN IVEY SANDLIN

No. 828SC1044

NORTH CAROLINA COURT OF APPEALS

April 5, 1983

Appeal by defendant from Llewellyn, Judge. Judgment entered 14 May 1982 in Superior Court, Lenoir County. Heard in the Court of Appeals 17 March 1983.

Defendant was charged in a proper bill of indictment with the murder of Linda Nguyen Sandlin. Defendant pleaded not guilty to the charge of first degree murder, but was convicted of second degree murder. From a judgment imposing a prison sentence of thirty-five years, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Boylan for the State.

Marcus, Whitley and Coley, by Robert E. Whitley, for the defendant, appellant.

HEDRICK, Judge.

The defendant first assigns error to the trial court's denial of his motion to dismiss at the conclusion of all the evidence. The evidence presented at trial tended to show the following. The defendant and the victim, Linda Nguyen Sandlin, were married in Vietnam in the early 1970's. The couple left Vietnam in 1973 and eventually settled in Las Vegas. In April of 1981 they moved to Pink Hill, North Carolina.

On or about 28 May 1981, Linda Sandlin visited an attorney to find out

if her husband, the defendant, had been properly divorced from his earlier marriage to Mildred Sandlin. Mildred Sandlin and the defendant were married in 1947. They separated in 1967, but they had never obtained a divorce. As a result of Linda Sandlin's visit, her attorney wrote Mildred Sandlin asking if the defendant had ever obtained a divorce from her, but Mildred Sandlin never responded to the letter. On 10 July 1981 the defendant called Mildred Sandlin concerning a possible visit to see her. During that conversation Mildred Sandlin brought up the subject of the attorney's letter. Defendant replied, "That's something Linda's started." Later in the day, Mildred Sandlin called the defendant's sister and told her that because of her military

dependent status she had been receiving "medication" and she did not want to lose that. The defendant testified he and Linda had discussed often the idea of getting a divorce from Mildred Sandlin and "what might happen in the case I passed away." Also, the decedent had expressed to the defendant's niece, Joann Stroud, her fear of losing her savings "in a home that would not be hers if something happened to John [Sandlin] because she had reason to believe that he had a legal wife living.

The State's witness, Jeff L. Moody, Sr., who lived next door to the defendant and the decedent, testified that he last saw Linda Sandlin on 21 July 1981 between 9:00 a.m. and 11:00 a.m. hanging a dress on her clothes line. Another witness, Lawton Earl Howard, testified

he passed the defendant's home several times on 21 July 1981 while transporting tobacco to his barn. He testified that he was driving by at approximately 9:00 a.m. or 9:30 a.m. and saw the defendant with a small woman whom he described was of a nationality other than American. On this occasion the defendant's car was parked in the carport with the front end facing in. When Mr. Howard passed by again at approximately 11:30 a.m. he noticed the defendant's car was backed into the carport. The trunk was about even with the doorsteps and the trunk lid was open. Two days later, on 23 July 1981, the defendant reported the victim as missing and stated he had last seen her at 1:45 or 2:00 p.m. on 21 July 1981.

On 14 September 1981 the victim's

body was found in a grave located near a group of pine trees behind Oak Ridge Memorial Cemetery in Pink Hill, North Carolina. The owner and operator of the cemetery, James Clifton Tyndall, testified that sometime during July the defendant had asked him if there was a road that went back to the cemetery to a row of pine trees. That conversation, along with the defendant's inquiries into the purchase of burial plots at the cemetery and the county sheriff's comments to Mr. Tyndall that foul play was suspected in connection with the victim's disappearance, prompted Mr. Tyndall's search of the area which resulted in locating the body.

In the medical examiner's opinion, the victim was dead when placed in the ground and had been buried for approxi-

mately two months. The cause of death was determined to be mechanical strangulation. A cloth ligature or binding was wrapped tightly around the decedent's neck. Expert testimony revealed the cloth ligature was a dull blue or dull heavy blue velour fabric.

Defendant's neighbor, Jeff Moody, Sr., testified that during visits to defendant's home he had seen the defendant wearing a dark blue bathrobe made of "the type of material that a regular downy towel is made of." The bathrobe had a belt of the same color and material that was about three feet long and an inch and a half wide.

On 16 September 1981 an S.B.I. agent told the defendant his wife had been found and read a search warrant to him. The defendant stated to the agent

that he sensed they were "building a case, a murder case against him and that anything he would say would be incriminating if he said it." A couple of weeks before Christmas, 1981, defendant visited a friend in Florida "checking on some information he had as to who was responsible . . ." for his wife's death. He remained in Florida until February.

Prior to Linda Sandlin's murder, her mother had seen the defendant hold a knife to Linda's neck and threaten to cut her throat in February 1979. On other occasions the mother had seen the defendant hit her daughter and kick her in the back. The defendant himself admitted he had slapped Linda before, and she had threatened to leave him "a hundred times." A long-time friend of the defendant, Anthony W. Shaw, testified that

during a conversation with the defendant in Las Vegas the defendant stated: "The best way that you could do away with a person would be to get a piece of wire and put [it] around their neck and strangle them. . . ."

The standard for determining whether the evidence is sufficient to withstand a motion to dismiss is whether the evidence raises a reasonable inference of the defendant's guilt. State v. Cutler, 271 N.C. 379, 156 S.E.2d 679 (1967). Considered in the light most favorable to the State, the evidence does support a reasonable inference that the defendant murdered Linda Sandlin. The evidence demonstrates the defendant's motive, an opportunity to commit the crime and a connection between the murder weapon and the defendant. Further-

more, the defendant's trip to Florida, his delay in reporting his wife's disappearance and his comment that the best means of commiting a murder was by strangulation all add to the reasonableness of a conclusion that the defendant committed the crime.

The victim was last seen in the presence of the defendant on the day she disappeared. The defendant's car was seen backed into the carport with the trunk lid open shortly after the defendant's neighbors last saw Linda Sandlin alive. A cloth ligature, similar in color and texture to the defendant's bathrobe belt, was found wrapped tightly around the decedent's neck. The defendant had also asked the local cemetery operator about a road running behind the cemetery to a row of pine trees where the body was eventually discovered.

The evidence showed past instances of violence by the defendant toward his wife. He had slapped and kicked her and once held a knife to her neck and threatened her life. By his own admission, the defendant had slapped the victim before. He also testified she had threatened to leave "a hundred times."

The victim was troubled by the defendant's earlier marriage to Mildred Sandlin, from whom he had never received a divorce. She was concerned about her financial security and her interest in the marital home if the defendant predeceased her without having divorced Mildred Sandlin. Linda Sandlin had discussed the matter with the defendant, her husband, and had also sought an attorney's advice. Despite a letter from Linda Sandlin's attorney, Mildred

Sandlin indicated an unwillingness to agree to a divorce because of the medical benefits she received as a military dependent. The defendant told Mary Ann Sanderson that he and Linda had planned a trip to Maryland to see Mildred Sandlin, presumably to discuss a divorce. From this evidence, a jury could reasonably infer that the defendant, caught between the competing interests of his two wives, had a motive to kill Linda Sandlin.

Even though the evidence presented was entirely circumstantial, the combination of circumstances and coincidences allows a reasonable inference of defendant's guilt. The evidence did more than simply cast suspicion on the defendant. It supplied a motive, demonstrated past hostility toward the victim, connected the murder weapon to the defendant

and connected the defendant to the place where the body was buried. Therefore, the trial court did not err in denying defendant's motion to dismiss on grounds of insufficient evidence.

The defendant next argues the trial judge erred in denying his motions for funds to hire an investigator and expert witness. He contends such a request should have been granted under N.C. Gen. Stat. § 7A-454 which provides:

> The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State.

Thus, the grant or denial of motions for appointment of associate counsel or expert witnesses lies within the trial

court's discretion and a trial court's ruling should be overruled only upon a showing of abuse of discretion.

Our Supreme Court noted the applicable standard for appointment of expert assistance to indigent defendants in State v. Johnson, 298 N.C. 355, 362-363, 259 S.E.2d 752, 758 (1979) (citations omitted):

> As in the case of providing private investigators or other expert assistance to indigent defendants, we think the appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial.

The basis for the statute is to provide a fair trial, but the defendant must show that "specific evidence is reasonably available and necessary for a proper defense." State v. Tatum, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976). The defendant in this case has failed to make such a showing.

The defendant points to the State's use of twenty-six different witnesses, some of whom lived out of state, the prosecutor's not calling all the witnesses interviewed by officers in Las Vegas, the State's use of four expert witnesses and his own use of thirteen witnesses as the reasons necessitating the court's appointment of an investigator and expert witnesses. There is no showing that any evidence other than that presented at trial was reasonably available or that

it would have assisted in preparation of a defense. We hold the trial court did not abuse its discretion in refusing to grant defendant's request for a court appointed investigator and expert witness.

The defendant also assigns error to the trial court's finding Dr. Frank Gaunt to be a qualified expert witness in the field of dyestuffs. He contends the witness only had experience in handling customer complaints for National Spinning Company and had never examined a piece of material to determine its original color after its piling was gone and it had been treated with a solvent as the ligature had been in this case.

Our examination of the record reveals the defendant failed to object to the court's admission of Dr. Gaunt as an expert and therefore the defendant's

objection is deemed to have been waived. State v. Edwards and State v. Nance, 49 N.C. App. 547, 272 S.E.2d 384 (1980). Even had the defendant properly objected, there was sufficient foundation for Dr. Gaunt's being admitted as an expert. Dr. Gaunt was the director of technical services at National Spinning Company and studied dyestuff chemistry at the University of Leeds in England where he received his doctorate in 1942. Since that time he has worked in the field of dyestuffs and fabrics. He had experience working with all types of natural and man-made fibers and conducted "many types of investigations of returns of materials from customers where it was necessary to decide how the item looked before being subjected to unknown treatment . . . ." Because the defendant did not object, and because the witness had sufficient

expertise to aid the jury and from which to express an opinion about the color of the ligature, the defendant's argument is without merit.

We also find to be without merit the defendant's contention that the trial court erred in permitting an interpreter to translate the trial testimony of Nhu Thi Ngo, the victim's mother. The defendant argues that no showing was made that the witness could not speak English. Yet, the record does indicate that Nhu Thi Ngo was asked, "Do you speak English," to which she responded through the interpreter, "Very little."

As to the qualifications of the interpreter, Tran Thi Nguyet, testimony during the court's voir dire showed she was a graduate of North Carolina State University, a citizen of Vietnam and

fluent in Vietnamese and English. Ms. Nguyet had taught Vietnamese to American military personnel at Fort Bragg and previously testified in other Superior Court trials. She was not related to any of the principal parties and was instructed that her translation be literal, truthful and impersonal. The interpreter's competence is borne out by the record and the defendant has not brought forward any evidence of bias on the interpreter's part or any prejudice to the defendant.

We also find no error in the trial judge's instruction to the deliberating jury that they should do everything they could to reach a verdict. The defendant argues that the jury was brought back into the courtroom at the trial judge's request so they could recess for dinner. At that time the jury foreman informed

the court the result of their vote was nine to three. The court arranged for the jury's transportation to a local restaurant for dinner. When the jury returned, the trial judge gave the following instruction:

> Now, ladies and gentlemen of the jury, before you resume your deliberations, as your foreman stated, it seems you've been thus far unable to agree upon a verdict. And I want to emphasize to you the fact that it is your duty to do whatever you can to reach a verdict. You should reason this matter over together as reasonable men and women and reconcile your differences, if you can, without the surrender of conscientious convictions. But no jury should surrender his or her honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors

> or for the mere purpose of returning a verdict. It is your duty to do whatever you can to reach a verdict.

N.C. Gen. Stat. § 15A-1235(c) provides:

> If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

There is nothing on the face of the trial judge's instructions which indicates a violation of the defendant's rights. There is also no showing of prejudice to the defendant or any demonstration that the trial judge coerced a verdict

by overemphasizing the jury's duty to reach a decision. We hold the trial judge did not commit prejudicial error through his subsequent instruction to the jury before it resumed deliberation.

The defendant's final contention relates to the thirty-five year prison sentence the defendant received for his conviction of second degree murder. The defendant argues there should have been a sentencing hearing to insure a fair sentence. We disagree.

Even though the presumptive sentence for second degree murder under N.C. Gen. Stat. § 15A-1340.4(f)(1) is fifteen years, the trial judge complied with his statutory duties. Under our system of presumptive sentencing, the judge may impose a greater or lesser sentence than the presumptive sentence upon a finding of aggravating or mitigating circumstances.

Pursuant to N.C. Gen. Stat. § 15A-1340.4 (a)(1)(f), the trial judge found as an aggravating factor the especially heinous, atrocious or cruel nature of the crime. He found the defendant's lack of a criminal record to be a mitigating factor. In accordance with N.C. Gen. Stat. § 15A-1340.4(b), the trial court then found that the aggravating factor outweighed the mitigating factor. As N.C. Gen. Stat. § 15A-1340.4(a) allows, the court is free to emphasize one factor more than another, and the discretionary weighing of mitigating and aggravating factors does not lend itself to a simple mathematical formula. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658 (1982). We hold the trial court complied with the statute and did not abuse its discretion in finding that murder by strangulation

was an especially heinous and cruel crime which outweighed defendant's lack of a criminal record.

We find the defendant had a fair trial free from prejudicial error.

No Error.

Judges WHICHARD and BRASWELL concur.